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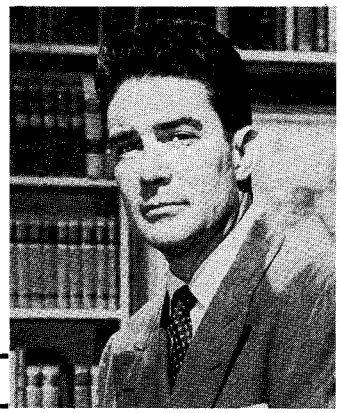

DAN SMOOT

SUPREME COURT'S PRAYER DECISION — PART III

The majority opinion of the Supreme Court's New York Prayer Case decision, on June 25, 1962 (written by Justice Hugo L. Black), says:

"We think that by using its public school system to encourage recitation of the Regents Prayer, the State of New York has adopted a practice wholly inconsistent with the establishment clause [that portion of the First Amendment which says: 'Congress shall make no law respecting an establishment of religion'] . . . .

"Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students is voluntary, can serve to free it from the limitations of the establishment clause . . . which are operative against the states by virtue of the Fourteenth Amendment. . . .

"The New York laws officially prescribing the Regents Prayer are inconsistent with . . . the purposes of the establishment clause. . . ."

This is corruption of the religious-freedom provisions of the First Amendment; and it is perversion of the intent of the Founding Fathers.

The First Amendment

When the Founding Fathers were in convention at Philadelphia, writing the Constitution, the old Congress of the United States (functioning under the Articles of Confederation) enacted, July 13, 1787, the Ordinance of 1787 establishing general principles of government for the western lands known as the Northwest Territory. The Ordinance was, in fact, a statutory Bill of Rights for residents of the Territories of the United States.

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The first article of the Ordinance of 1787 guaranteed freedom of religion, in these terms:

"No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory."

Two months after this Ordinance was passed, as the Constitutional Convention was drawing to a close, Gerry of Massachusetts and Mason of Virginia, proposed that a Bill of Rights (similar to the provisions of the Northwest Ordinance) be written into the Constitution. The Constitutional Convention rejected the proposal.

Because the Constitution was thus written without a specific Bill of Rights, there was widespread opposition to its adoption. George Washington helped overcome this opposition by suggesting that the desired guarantees of human freedom could be added to the Constitution by amendment, after the Constitution was ratified and adopted by the 13 states.

In his first inaugural address, on April 30, 1789, President Washington recommended that Congress consider the problem of proposing constitutional amendments.

So, in the first session of the First Congress (1789), James Madison (then a U.S. Representative from Virginia) introduced in the House a series of resolutions proposing constitutional amendments,

"to quiet the apprehension of many that, without some such declaration of rights, the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable. . . ."

The first amendment which Madison proposed was intended to guarantee freedom of religion. It read:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established nor shall the full and equal rights of conscience be in any manner, or on any pretense, infringed."

The House altered Madison's resolution to read:

"Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."

The Senate rejected this resolution and proposed one which read:

"Congress shall make no law establishing articles of religion."

The Conference Committee of the two houses agreed on the version which was submitted to the states for ratification, and which became the religious freedom provisions of the First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."(1)

An explanation of the freedom-of-religion sections of the First Amendment was written by Justice Joseph Story, a contemporary of the men who wrote the Amendment and of the people who adopted it as part of the Constitution. Story was a Justice of the United State Supreme Court for 34 years — 1811 to 1845. His three-volume *Commentaries on the Constitution of the United States,* published in 1833 when Story was a veteran member of the Supreme Court, is not only among the oldest but also among the most authoritative explanations of the real meaning of our Constitution.

In his commentary on the First Amendment, Justice Story said that the purpose of the "religious" provisions was *not* to discredit the then existing State establishments of religion, but merely "to exclude from the *National Government* all power to act on the subject." In his *Commentaries on the Constitution of the United States,* Justice Story says:

"In some of the states, Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists;

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in others, Quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendency, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests.

"Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship."

Justice Story explained, however, that the "establishment clause," while restraining Congress from giving preference to any denominational group of the Christian faith, was not intended to withdraw the Christian religion as a whole from the protection of Congress. In his *Commentaries,* Justice Story said:

"Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship.

"An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."(2)

Another widely recognized authority on the Constitution of the United States was Thomas McIntyre Cooley, a Justice of the Michigan Supreme Court from 1864 to 1885, and a professor of law at the University of Michigan.

On pages 224-225 of the third edition of his *Principles of Constitutional Law,* published in 1898, Judge Cooley made the following comment on the "establishment" clause of the First Amendment:

"By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the Constitution that the government should be prohibited from recognizing religion."(3)

The most dangerous distortion of constitutional meaning, in the Supreme Court's New York Prayer Case decision, is the Court's claim that the First Amendment's limitations against the federal Congress are now also limitations against state governments, "by virtue of the Fourteenth Amendment."

This false doctrine — that the Fourteenth Amendment has "absorbed" our Bill of Rights — is responsible for most of the sinister corruptions of constitutional meaning, by which the Supreme Court is undermining our whole system of constitutional law, and destroying our "inalienable" God-given rights.

When James Madison (in the First Session of the First Congress) submitted to the House of Representatives a series of resolutions proposing constitutional amendments, he actually proposed 17 amendments. After much debate, these were reduced to 12 in number and submitted to the states for ratification. The states ratified 10 of the 12 (rejecting 2), and these first ten amendments to our Constitution came to be known as the American Bill of Rights.

In essence, the first ten amendments (and most particularly the First Amendment) fix limitations upon the powers of the *federal Congress:*

"*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

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right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

One of James Madison's proposed constitutional amendments, which the Senate rejected — and which, therefore, was never submitted to the states for ratification — read:

"The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed *by any State*."

In short, before the Bill of Rights was ever submitted to the states for action, Madison specifically raised the issue of whether the Bill-of-Rights' limitations on the power of government should limit the state governments as well as the federal government.

The First Congress clearly and emphatically decided that the Bill-of-Rights' prohibitions should apply only to the federal government. The first ten amendments were submitted to the states, and ratified by them, with this clear understanding.[1]

Nonetheless (despite the deliberate and purposeful rejection of Madison's proposal that the first ten amendments should limit state governments as well as the federal), the contention that the limitations should apply to state governments was persistently urged upon the Supreme Court. The Supreme Court, however, consistently rejected this contention — in a long series of decisions, beginning with the opinion written by Chief Justice John Marshall in *Barron versus Baltimore* in 1833.[1]

Fourteenth Amendment

The Fourteenth Amendment was proposed June 13, 1866. The Amendment was conceived by the Thaddeus Stevens radicals who controlled the Reconstruction Congress. Even at the point of army bayonets, the radicals could not force enough states to ratify the Fourteenth Amendment to make it a legal part of our Constitution. Nonetheless, the Fourteenth was arbitrarily "proclaimed" as ratified on July 20, 1868.[4]

In contrast to the clarity and precision of the Constitution and first ten amendments written by the Founding Fathers in 1787 and 1789, much of the Fourteenth Amendment of 1866-1868, is not precise in meaning; and it does, therefore, give the Courts opportunity to read into it almost any meaning the judges wish.

Despite this fact, however, the general intent of the Fourteenth Amendment (as written in 1866 and as illegally proclaimed a part of the Constitution in 1868) is obvious, as was stated by the Supreme Court in the Slaughter-House Cases decision of 1873: the sole "pervading purpose" of the Fourteenth Amendment was "the freedom of the slave race."[5]

Section I of the Fourteenth Amendment says:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges or immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law;* nor deny to any person within its jurisdiction the *equal protection of the laws.*"

The italicizing is added to distinguish the three clauses of the Fourteenth Amendment which have figured most prominently in controversial Court decisions: (1) the *privileges or immunities* clause; (2) the *due process* clause; and (3) the *equal protection* clause.

Almost immediately after the proclaimed ratification of the Fourteenth Amendment in 1868, the old issue, which had been raised and handled in the First Congress of 1789, and finally settled by the 1833 decision of Chief Justice John Marshall (and by other Supreme Court decisions), was raised again: extension

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of the Bill-of-Rights' limitations on the power of government to include state governments.

The Slaughter-House Cases of New Orleans (decided by the Supreme Court in 1873) made the first test of the contention that the Fourteenth Amendment had absorbed the Bill of Rights and extended its limitations to include state governments as well as the federal.

The Slaughter-House Cases involved butchers who challenged a Louisiana law which granted to one corporation the exclusive privilege of butchering cattle in New Orleans. The butchers contended that the Louisiana law abridged their "privileges" to be butchers, and denied them their liberty without due process of law.

However much sympathy there might have been with the butchers who were trying to fight a state-granted monopoly to one private firm, the Supreme Court in 1873 felt that the Slaughter-House Cases were actually being pressed by persons whose real purpose was:

to centralize "in the hands of the Federal Government powers hitherto exercised by the States," with a view to enabling business to develop unimpeded by State interference. This expansive alteration of the Federal System was to have been achieved by converting the rights of the citizens of each State as of the date of the adoption of the Fourteenth Amendment into privileges and immunities of United States citizenship and thereafter perpetuating this newly defined *status quo* through judicial condemnation of any State law challenged as abridging any one of the latter privileges.

To have fostered such intentions, the Court declared, would have been, "to transfer the security and protection of all the civil rights to the Federal Government, to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States, and to constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this [Fourteenth] amendment.

"The effect of so great a departure from the structure and spirit of our institutions is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers, heretofore universally conceded to them, of the most ordinary and fundamental character.

"We are convinced that no such results were intended by the Congress, nor by the legislatures which ratified this [Fourteenth] amendment. . . ."(6)

In 1877 (*Munn versus Illinois*), the Court reaffirmed the constitutional doctrine enunciated in the Slaughter-House Cases of 1873 — refusing to interpret the *due process* clause of the Fourteenth Amendment as invalidating State legislation regulating the rates charged for the transportation and warehousing of grain. In this 1877 decision, Justice Waite said:

"We know that this power [of rate regulation] may be abused; but . . . . for protection against abuses by [State] legislatures, the people must resort to the polls, not to the courts."(7)

In 1878 (*Davidson versus New Orleans*), the Supreme Court again reaffirmed the doctrine of the 1873 decision; and Justice Miller rebuked those who were crowding the docket of the court,

". . . with cases in which we are asked to hold that State Courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision [due process clause] as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."(8)

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The issue would not die, however. Those who wanted to transform our federal system into a centralized system (by transferring all rights of the state governments to the central government in Washington) kept bringing cases into the courts, virtually badgering the Supreme Court for a decision that the Fourteenth Amendment had absorbed the first ten amendments and made them applicable to state governments. Between 1877 and 1907, the Court heard at least twenty cases, in which it reaffirmed the dictum that the Fourteenth Amendment did not extend the prohibitions of the Bill of Rights against the state governments.

But the position of the Court on this point began to weaken at the turn of the century.

In 1905 (*Lochner versus New York*), the Supreme Court overturned a New York State law regulating working hours in bakeries, on the grounds that the law violated the due process clause of the Fourteenth Amendment, by denying laborers the right to contract as they pleased for the sale of their own labor.

Justice Peckham, who wrote the majority decision in *Lochner versus New York*, denied that the Court was substituting its own judgment for that of the legislature of New York. But Justice John Marshall Harlan (grandfather of the present Supreme Court Justice) dissented in words which have proven prophetic. Justice Harlan, disagreeing with the decision of the Court majority in the 1905 case, said:

"No evils arising from . . . [State] legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . The public interest imperatively demands that —legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution."(9)

Finally, in 1925, the Supreme Court (*Gitlow versus New York*) specifically accepted the doctrine that the Fourteenth Amendment had absorbed the Bill of Rights, extending the prohibitions of the First Amendment to state governments, thus giving the Supreme Court supervisory powers over state legislation. In this Gitlow case, the Court said:

"For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States."(10)

Two years later (1927—*Fiske versus Kansas*), this dictum became accepted doctrine when the Court invalidated a State law on the ground that it abridged freedom of speech contrary to the due process clause of the Fourteenth Amendment.

Constitutional Revolution

Ten years later (1937), the Supreme Court began to weaken the doctrine of *Stare Decisis* and thus produced what is described on page 565 of Senate Document No. 170 as a "constitutional revolution."

Stare Decisis is an abbreviation of a Latin expression which means, "to stand by decisions and not to disturb settled matters." In law, *Stare Decisis* means the doctrine, or policy, on the part of courts, of following principles laid down in previous judicial decisions, unless they contravene the ordinary principles of justice.

The doctrine of *Stare Decisis* was essential in the development of the English common law —and of all law in the United States. In any

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free, civilized society, citizens must know, with reasonable certainty, what the law of the land is, else it is impossible for them to be law-abiding. When the highest court reverses its own decisions, it is saying that what was legal yesterday is illegal today but may again be legal tomorrow, depending on how the court feels about it. When such a state of affairs prevails for a long period of time, even the most civilized nation of people will become a lawless society, kept orderly only by force of dictatorship.

In 1937, the Supreme Court began to lay the groundwork for such a condition in America, when it started repudiating the ancient doctrine that it must follow the precedent of its own decisions. Between March 27, 1937, and June 14, 1943, the Supreme Court reversed earlier decisions of the Court on constitutional questions in fourteen different cases.[11]

In 1944, Supreme Court Justice Owen Roberts (dissenting from the Court decision in *Smith versus Allwright,* which reversed a previous Court decision) said that the Court's frequent reversals of earlier decisions tended to bring adjudications of the Supreme Court "into the same class as a restricted railroad ticket, good for this day and train only."

Justice Frankfurter also began dissenting, in 1944, saying that the Court was discrediting itself by reversing its own decisions.

No Constitution

This criticism from within the Court slowed down the erosion of the great principle of *Stare Decisis* — until Eisenhower made Earl Warren Chief Justice, in 1953.

In *Brown versus School Board* (the school segregation case) decision on May 17, 1954, Warren (supported by all other members of the Court) dealt a heavy blow to the doctrine of *Stare Decisis* and to several other basic principles of adjudication.

On previous occasions when the Court reversed itself, the justices at least pretended to be following honest conviction about what the Constitution actually means. In the school segregation case, Warren inferentially admitted that the Court had no *constitutional* grounds for its decision.

Warren admitted that the Fourteenth Amendment, as written, was not intended to affect the operation of public schools. He said, however, that, in view of "modern" sociological information, he felt that the Fourteenth should be *interpreted* as affecting racial segregation in schools.

Warren cited various writings of communists and communist-fronters as the modern authorities on whom he was relying, in preference to the Constitution — a principal authority being *An American Dilemma,* a book by Gunnar Myrdal, a Swedish socialist with a communist-front record (whose son is an official of the communist party in Sweden). In this book, Mr. Myrdal expresses contempt for the United States Constitution.

Earl Warren arbitrarily changed the meaning of the Constitution, because of the opinions of communists and socialists whom he cited as authorities.

In the school segregation decision, the Supreme Court not only employed the false doctrine that the Fourteenth Amendment absorbed the Bill of Rights; it not only abandoned the principle of *Stare Decisis* by reversing a previous Supreme Court decision; but it also enunciated the new doctrine that the Supreme Court can change the Constitution at will, without regard to law, constitutional meaning, or precedent.

From the time that decision was handed down until the time when the people of America demand that Congress correct the situation, we actually have no Constitution at all. We are at the mercy of the judicial oligarchy.

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On June 25, 1962, that oligarchy — in the New York School Prayer Case Decision — adulterated the most cherished and important right of all the people of America: the right to teach a reverence for God to their own children in their own schools.

Part IV

The 1954 school-segregation case did not really create much consternation in the Congress — except among southerners — or among the people, except in the South. But the school segregation case set the precedent for the Court's lawless behavior, which resulted in the School Prayer Case decision, and will result in many more — if something is not done.

The School Prayer Case decision has aroused Congress and the nation — more than any other action by any agency of government has ever aroused them. Even people who praised the school-segregation decision of 1954 are outraged and frightened by the terrifying implications of the School Prayer Case decision.

An astonishing number of United States Senators and Representatives have taken formal steps intended to do something about the Prayer Case decision. Some of the proposals do not make much sense. Some are dangerous.

Next week, I shall review some of the reactions in Congress to the Prayer Case decision — and suggest sound constitutional means for curbing the Court.

FOOTNOTES

(1) History of the First Amendment is from pages 749-751 of *The Constitution Of The United States of America: Analysis and Interpretation: Annotations of Cases Decided By The Supreme Court Of The United States To June 30, 1952*, prepared by the Legislative Reference Service of the Library of Congress, and published in 1953 by the Government Printing Office as Senate Document No. 170.

(2) Pages 758, 759 of Senate Document No. 170 — fully described in Footnote No. 1

(3) Page 759 of Senate Document No. 170

(4) *The Fourteenth Amendment To The Constitution Of The United States: A Study*, prepared and published in 1960 by Walter E. Long, No. 1 Green Lanes, P. O. Box 1, Austin, Texas

(5) Page 966 of Senate Document No. 170

(6) These quotations and extracts from, and interpolations of, the Supreme Court's decision in the Slaughter-House decision of 1873 are from pages 965 and 966 of Senate Document No. 170, described fully in Footnote No. 1.

(7) Page 972 of Senate Document No. 170

(8) Page 973 of Senate Document No. 170

(9) Pages 977, 978 of Senate Document No. 170

(10) Page 757 of Senate Document No. 170

(11) Page 565 of Senate Document No. 170

WHO IS DAN SMOOT?

Dan Smoot was born in Missouri. Reared in Texas, he attended SMU in Dallas, taking BA and MA degrees from that university in 1938 and 1940.

In 1941, he joined the faculty at Harvard as a Teaching Fellow in English, doing graduate work for the degree of Doctor of Philosophy in the field of American Civilization.

In 1942, he took leave of absence from Harvard in order to join the FBI. At the close of the war, he stayed in the FBI, rather than return to Harvard.

He worked as an FBI Agent in all parts of the nation, handling all kinds of assignments. But for three and a half years, he worked exclusively on communist investigations in the industrial midwest. For two years following that, he was on FBI headquarters staff in Washington, as an Administrative Assistant to J. Edgar Hoover.

After nine and a half years in the FBI, Smoot resigned to help start the Facts Forum movement in Dallas. As the radio and television commentator for Facts Forum, Smoot, for almost four years spoke to a national audience giving both sides of great controversial issues.

In July, 1955, he resigned and started his own independent program, in order to give only one side — the side that uses fundamental American principles as a yardstick for measuring all important issues.

If you believe that Dan Smoot is providing effective tools for those who want to think and talk and write on the side of freedom, you can help immensely by subscribing, and encouraging others to subscribe, to *The Dan Smoot Report.*

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